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FILED

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CLIFTON W. WILKINS  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
NORTHERN DIVISION OF CALIFORNIA  
SAN FRANCISCO DIVISION

WACHOVIA BANK, N.A. AS  
TRUSTEE (BAY VIEW),

Plaintiff,

v.

JOHN CLIFTON ELSTEAD,  
et. al.,

Defendants.

CASE NO. CV076015 SI

REPLY TO OPPOSITION TO MOTION  
TO DISMISS FOR FAILURE TO STATE  
A CLAIM UPON WHICH RELIEF  
CAN BE GRANTED

[FRCP 12 (b) (6)]

DATE: February 15, 2008

TIME: 9:00 A.M.

CRTRM: 10

The following shows how Wachovia fails to offer any valid reason in its opposition for denying the motion and dismissing its complaint. Wachovia not only fails to dispute Elstead's claim that the issues raised by its agent Chase in the action on appeal "are identical to those raised" in this action, it also fails to show why this action is not automatically stayed by that appeal. (Elstead Memo: p. 2: 10-12.):

1. Wachovia misreads applicable law and incorrectly asserts that Elstead has not

1 “perfected his appeal... [because he has not]... filed an undertaking.” (Wachovia Opp: p. 2: 22-  
 2 25.)<sup>1</sup> An appeal is perfected without regard to an undertaking when a timely notice of appeal is  
 3 filed and Elstead timely filed his notice on April 12, 2007. (Gold v Superior Court (1970) 3 C3d  
 4 275, 280; CCP 916(a), 917.1(a); Elstead Dec: Ex. 9.) The judgment appealed from may or may  
 5 not require an undertaking to stay its enforcement, depending upon whether it is a type of  
 6 judgment specifically excepted from the automatic stay rule, but that has nothing to do with  
 7 whether the appeal is perfected. (Gold, supra, at 280; CCP 917.1 – 917.9.)

8  
 9 2. Wachovia miscites CCP 917.4 for the erroneous proposition that the judgment  
 10 for Chase on appeal requires an undertaking. (Wachovia Opp: p. 2: 22-25, p. 3: 1.) That  
 11 statute only applies to a judgment that “directs the sale, conveyance or delivery of possession of  
 12 real property” and the judgment for Chase directs no such thing! It is simply a summary  
 13 judgment that Elstead “recover nothing” from Chase, the agent that serviced the Wachovia loan  
 14 at issue. (Elstead Dec: Ex. 8.) It is not a judgment “for money” and is therefore automatically  
 15 stayed without an undertaking. (CCP 916.1(a), 917.1(a)(l).) It awards “costs,” but “no  
 16 undertaking... [is]... required... for costs.” (CCP 917.1(d).)

17  
 18 3. Wachovia and Chase are admitted agents and, on May 8, 2002, the trial court in the  
 19 action on appeal issued a preliminary injunction enjoining Chase and its agents “during the  
 20 pendency of” the action “from instituting foreclosure proceedings” as to the debt alleged in this  
 21 action. (Elstead Dec: Ex. 4.) The judgment appealed from includes and refers to the preliminary  
 22 injunction, which means that the court cannot modify or ignore the injunction during the appeal  
 23 and allow Wachovia to proceed with this action. (Elstead Dec: Ex. 8; Varian Medical Systems,  
 24 Inc. v Delfino (2005) 35 C4th 180, 198, fn. 9, citing Environmental Coalition of Orange County,  
 25 Inc. v AVCO Community Developers, Inc. (1974) 30 CA3d 513, 525; Walmart Foods v United  
 26 Food & Commercial Workers Union (2001) 87 CA4th 145, 154 [Citation].)

27  
 28 <sup>1</sup> Wachovia incorrectly refers to the motion as the “opposition” and to Elstead as the “plaintiff.”  
 (Wachovia Opp: p. 2: 22.) He is one of the defendants.

1           4. The preliminary injunction aside, Varian, supra, makes clear that the automatic stay  
2 of the action on appeal deprives this court of subject matter jurisdiction over this action. “The  
3 purpose of the automatic stay...’ is to protect the appellate court’s jurisdiction by preserving the  
4 status quo until the appeal is decided... [it] prevents the trial court from rendering an appeal futile  
5 by altering the appealed judgment or order by conducting other proceedings that may affect it.”  
6 (ID., at 189 [Citation].) “To accomplish this purpose, section 916, subdivision (a) stays all  
7 further trial court proceedings ‘upon the matters embraced’ in or ‘affected’ by the appeal.” (ID.)  
8 “[W]hether a matter is ‘embraced’ in or ‘affected’ by a judgment... depends on whether  
9 postjudgment... proceedings on the matter would have any effect on the effectiveness of the  
10 appeal.” (ID. [Citation].) “‘If so, the proceedings are stayed...’” (ID. [Citation].)

11  
12           5. “A contrary conclusion would allow the trial court to render an appeal futile. If trial  
13 court proceedings during the pending of the appeal are consistent with the reviewing court’s  
14 resolution of the appeal, then the appeal is, in effect, futile because the trial court has already  
15 granted the relief that would have been granted on appeal. And if trial court proceedings during  
16 the pendency of the appeal conflict with the reviewing court’s resolution of the appeal, then the  
17 appeal will likely be futile because the prevailing party, in most instances, will have no adequate  
18 remedy left. Because ‘the remedy by appeal cannot be denied to an aggrieved party dissatisfied  
19 with the judgment or the order appealed from by an act of the trial court in the action, at the  
20 behest or on the motion of the respondent, after an appeal has been taken and is pending’  
21 [Citation], the automatic stay... must divest the trial court of fundamental jurisdiction over the  
22 matters embraced in or affected by the appeal [Citation].” (ID., at 198.)

23  
24           6. Wachovia’s right to foreclose turns on whether its agent Chase mishandled the loan  
25 and the issue on appeal is whether Elstead has the right to go to trial against Chase to prove the  
26 mishandling, a right which the trial court ruled was barred by the statute of limitations. (Elstead  
27 Dec: Ex. 7.) If this case is allowed to proceed and the results are consistent with the results of  
28 the appeal, then the appeal is effectively futile because this court will have already granted the


1 same relief as that of the appeal. (Varian, supra, at 198.) Elstead's defense is the Chase  
2 mishandling and if he prevails in this action and on appeal, then the relief sought in the appeal is  
3 meaningless. If he loses his action and wins the appeal, then the appeal is also meaningless. He  
4 will have lost his Chase defense in this action and then be granted the right to go to trial, thereby  
5 facing a res judicata or collateral estoppel defense to his granted right to go to trial against  
6 Chase!

7  
8 7. Wachovia correctly notes that the appeal "has not been completed" during its res  
9 judicata discussion, but fails to note the ludicrous consequences if this case is allowed to proceed  
10 and how the automatic stay is designed to prevent such consequences. (Wachovia Opp: p. 8: 5-  
11 6.) If this case is dismissed as it should be and Elstead ultimately prevails in the case against  
12 Chase, then Wachovia is bound by the judgment under res judicata and cannot foreclose. If, on  
13 the other hand, this case is not dismissed and Elstead ultimately prevails in the case against  
14 Chase, then one of two ludicrous things will occur. If Wachovia wins this action, the end result  
15 will be inconsistent and contradictory judgments. If Wachovia loses, then this case will have  
16 denigrated judicial economy by allowing reptitious litigation of the same issue. (See Sych v  
17 Insurance Co. Of North America (1985) 173 CA3d 321, 328 [Citation].)

18  
19 CONCLUSION

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21 For the foregoing reasons, and those previously stated, it is requested that the motion be  
22 granted and the complaint be dismissed.

23  
24 DATED: 2/5/08

25  
26  
27   
28 JOHN CLIFTON ELSTEAD  
Defendant/Pro Se

**CERTIFICATE OF SERVICE**

I, Elaine Howton, declare that:

1. I am a citizen of the United States of America, I am over the age of eighteen, and I am not a party to the above-entitled action.
2. I caused copies of the Reply to Opposition to Motion to Dismiss For Failure to State a Claim Upon Which Relief can be Granted to be served this date by placing true copies thereof in sealed envelopes, with postage fully prepaid, addressed to the following:

John Sorich  
Adorno Yoss Alvarado & Smith  
1 MacArthur Place, Suite 200  
Santa Ana, CA 92707  
Attorneys for Plaintiff Wachovia Bank

Thomas Newman  
Assistant US Attorney  
450 Golden Gate Ave., Box 36055  
San Francisco, CA 94102  
Attorneys for Defendant  
USA

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Certificate was executed on February 5, 2008 at Pleasanton, California.

  
ELAINE HOWTON